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Provisional summary record of the 3436th meeting
Held at the Palais des Nations, Geneva, on Thursday, 26 July 2018, at 10 a.m.

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Report of the Drafting Committee

Present:

Chair:	Mr. Valencia-Ospina
Members:	Mr. Argüello Gómez
	Mr. Aurescu
	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Gómez-Robledo
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Hmoud
	Mr. Huang
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Mr. Nolte
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Rajput
	Mr. Reinisch
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	Mr. Tladi
	Mr. Vázquez-Bermúdez
	Sir Michael Wood
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 10.05 a.m.

Organization of the work of the session (agenda item 1) (*continued*)

The Chair said that the Commission would first receive the report of the Drafting Committee on the topic "Protection of the environment in relation to armed conflicts".

Mr. Tladi, noting that it was the responsibility of the Bureau to discuss issues and provide guidance to the Chair, said that very few Bureau meetings had been held and that many changes had been made to the schedule of meetings. In that connection, he pointed out that the Drafting Committee on the topic of "Peremptory norms of general international law (*jus cogens*)" had completed its work two weeks earlier and that the presentation of its report on that topic had been scheduled for 20 July, moved to 23 July and then no more had been heard of it. It would make sense and be appropriate to consider the report of the Drafting Committee on the topic "Peremptory norms of general international law (*jus cogens*)" before its report on the topic "Protection of the environment in relation to armed conflicts". Those issues could have been addressed if a Bureau meeting had been held to discuss them. He could not therefore agree to the Chair's proposal to hear the report of the Drafting Committee on the topic "Protection of the environment in relation to armed conflicts" before its report on the topic "Peremptory norms of general international law (*jus cogens*)".

The Chair said that the Commission had not considered the report of the Drafting Committee on the topic "Peremptory norms of general international law (*jus cogens*)" on 20 or 23 July, as scheduled, because the Special Rapporteur on that topic had not been available at that juncture. The reason why the report of the Drafting Committee on the topic "Protection of the environment in relation to armed conflicts" had been scheduled for the current meeting was that the Drafting Committee had completed its work on that topic and had adopted three texts, whereas the Drafting Committee still needed more time the following year to complete its consideration of the draft conclusions on *jus cogens* which had been submitted during the current year. Other considerations which had to be taken into account included the availability of other special rapporteurs and the fact that the Drafting Committee was not submitting any texts on *jus cogens* for adoption by a plenary sitting. He had therefore decided to schedule the presentation of the lengthy report of the Drafting Committee on *jus cogens* for the afternoon of 30 July before or after the introduction of Special Rapporteur's sixth report on immunity of State officials from foreign criminal jurisdiction.

Mr. Tladi said that none of the reasons given by the Chair had been convincing. His absence could not be the reason why the report on *jus cogens* had not been taken up by the Commission on 20 July, since on 19 July he had heard the Chair state that the report of the Drafting Committee on *jus cogens* would be presented on 20 July, even though the Special Rapporteur would not be present. The Chair was inventing a new practice by saying that, when draft texts were still outstanding, there was no need to receive a Drafting Committee report. It was not the first time that the Drafting Committee had been unable to complete a full set of draft texts, and the Commission's practice had always been to consider Drafting Committee reports in the order in which they had been completed. He could not therefore agree with the Chair's proposal.

The Chair said that he had concluded that the presentation of the Drafting Committee's report on *jus cogens* would absorb an inordinate amount of the precious time which the Commission needed to complete its programme of work for the current year. He had not heard any other members complain about adhering to the programme. The Secretariat could be asked to provide information about past practice. He invited members to comment.

Mr. Gómez-Robledo said that the easiest solution would be to hear both Drafting Committee reports at the current meeting and to postpone the adoption of the chapter of the draft report concerning provisional application of treaties until later meetings.

The Chair said that debates had been scheduled to take account of the absence of the Special Rapporteur on provisional application of treaties the following week and to allow enough time for the Special Rapporteur on immunity of State officials from foreign

criminal jurisdiction to introduce her report and for the Commission to begin to discuss it. While he had no objection to the proposal made by Mr. Gómez-Robledo, it would obviously have repercussions on the time available for debating the other chapters of the draft report.

Mr. Nolte said that Mr. Tladi's concerns merited discussion at the following meeting of the Bureau. As the order in which topics were discussed was a practical issue, he was in favour of proceeding in the manner proposed by the Chair.

The Chair said that he was prepared to call an immediate meeting of the enlarged Bureau to discuss the problem at length, in order to satisfy those who considered that it was impossible to proceed without such a meeting.

Ms. Escobar Hernández said that she realized that the Chair and the Bureau had made a great effort to facilitate consideration of all the topics on the agenda in a timely manner. Therefore, although she fully understood Mr. Tladi's wish to have the report of the Drafting Committee on the topic for which he was Special Rapporteur presented at the current session, she supported the proposal made by the Chair, even though it might result in the time allotted to the consideration of the topic for which she was Special Rapporteur, namely immunity of State officials from foreign criminal jurisdiction, being impinged on.

Sir Michael Wood, supported by **Mr. Hmoud**, said that the Commission should adopt the helpful suggestion made by Mr. Gómez-Robledo.

Mr. Jalloh (Chair of the Drafting Committee) said that both reports were ready and he would be happy to fall in with the aforementioned suggestion.

Peremptory norms of general international law (*jus cogens*) (agenda item 9) (*continued*) (A/CN.4/714 and A/CN.4/714/Corr.1)

Interim report of the Drafting Committee

The Chair invited the Chair of the Drafting Committee to present the interim report of the Drafting Committee on the topic "Peremptory norms of general international law (*jus cogens*)".

Mr. Jalloh (Chair of the Drafting Committee) said that the Drafting Committee on peremptory norms of general international law (*jus cogens*) had held three meetings in New York during the first part of the current session, at which it had adopted draft conclusions 8 and 9 concerning, respectively, evidence of acceptance and recognition, and subsidiary means for the determination of the peremptory character of norms of general international law (*jus cogens*). He had presented an oral interim report on those two draft conclusions at the 3402nd meeting, on 14 May 2018 (A/CN.4/SR.3402). Draft conclusions 1 and 3 had been adopted at the sixty-eighth session, and draft conclusions 2 and 4 to 7 at the sixty-ninth session.

During the second part of the current session, the Drafting Committee had held a total of four meetings, on 9, 10, 11 and 12 July 2018, at which the 14 new draft conclusions proposed by the Special Rapporteur in his third report (A/CN.4/714 and A/CN.4/714/Corr.1) had been examined. The Commission had referred those draft conclusions to the Drafting Committee on 9 July 2018, together with the comments and drafting suggestions made in the plenary debate, on the understanding that the Drafting Committee would also consider the Special Rapporteur's proposed reformulation of draft conclusions 22 and 23 as a "without a prejudice clause". In the short time available, the Drafting Committee had been able to consider and adopt only draft conclusions 10 to 14 and would therefore take up the consideration of draft conclusions 15 to 23 at the Commission's seventy-first session. The draft conclusions for that topic would remain with the Drafting Committee until it had adopted a full set for submission to the Commission for approval.

As far as the approach to the topic was concerned, in response to the prevailing view which had emerged in the plenary debate, the Drafting Committee had sought as far as possible to align the text of the draft conclusions proposed by the Special Rapporteur with that of the relevant provisions of the 1969 Vienna Convention on the Law of Treaties. However, given the particular nature of the draft conclusions, the Drafting Committee

had sometimes diverged from the structure and language of the Vienna Convention, where appropriate, in order to allow for the specificities of the topic.

Although, during the plenary debate, it had been suggested that several of the draft conclusions proposed by the Special Rapporteur should refer to international organizations, the Drafting Committee had decided to consider the implications of including international organizations in its work on the topic at a later stage, once it had agreed on a set of draft conclusions as a whole. That method was in keeping with the Special Rapporteur's suggestion in his first report (A/CN.4/693) that a fluid approach should be employed for the adoption of draft conclusions on the topic.

Turning more specifically to draft conclusions 10 to 14, he first drew the Commission's attention to draft conclusion 10 concerning the legal consequences of a conflict between a treaty and a peremptory norm of general international law (*jus cogens*). Paragraph 1 confirmed that a treaty was void if, at the time of its conclusion, it conflicted with a peremptory norm of general international law (*jus cogens*). While the Drafting Committee had adopted the first sentence of the paragraph as proposed by the Special Rapporteur, it had decided to adjust his proposal for the second sentence to follow more closely article 69 (1) of the Vienna Convention, which stated that "the provisions of a void treaty have no legal force". The phrase "have no legal force" was broader than the formulation "does not create any rights or obligations", which had been suggested by the Special Rapporteur. As the commentary would make clear, the use of that language served solely to define what was meant by "void" in the first sentence. It did not signify that certain effects or consequences occurred before the fulfilment of the procedural requirements for establishing that a treaty was, in fact, void, which were set out in draft conclusion 14. Indeed, as the Special Rapporteur had noted during the debate on the draft conclusion, the consequences of a treaty being void in accordance with draft conclusion 10 were equally dependent on the procedural requirements set forth in draft conclusion 14.

Paragraph 2 of draft conclusion 10 covered the situation where an existing treaty became void and terminated owing to the emergence of a new peremptory norm of general international law (*jus cogens*), in consequence whereof the parties to the treaty were released from any obligation further to perform the treaty. While the Drafting Committee had agreed with the substance of the initial wording proposed by the Special Rapporteur, it had decided to align the text with the relevant provisions of the Vienna Convention. The first sentence followed verbatim article 64 of the Vienna Convention, while the second sentence replicated article 71 (2) (a) of the Vienna Convention.

The Drafting Committee had decided to hold paragraph 3 of draft conclusion 10, as proposed by the Special Rapporteur, in abeyance until a later stage, as it intended to craft a separate draft conclusion which would provide for a general rule requiring that a treaty should be interpreted in a manner consistent with peremptory norms of general international law (*jus cogens*). Such a rule would also apply to other sources of law and obligations.

The title of draft conclusion 10 was "Invalidity and termination of treaties in conflict with a peremptory norm of general international law (*jus cogens*)". The title proposed by the Special Rapporteur had been modified to take account of the fact that the draft conclusion covered not only invalidity but also the termination of a treaty in conflict with a peremptory norm of general international law (*jus cogens*). The Drafting Committee had discussed whether to replace the term "invalidity" with "void" to reflect the body of the draft conclusion, but after comparing corresponding terminology in other languages, it had decided not to draw a substantive distinction between the terms "void" and "invalid", which were used interchangeably. The term "void" was employed in the text and the term "invalidity" in the title of draft conclusion 10, and in subsequent draft conclusions, where applicable.

Draft conclusion 11 concerned the possible separability of treaty provisions which were in conflict with a peremptory norm of general international law (*jus cogens*). It drew a distinction between the status of a treaty which, at the time of its conclusion, conflicted with a peremptory norm and the status of a treaty which became void owing to the emergence of a new peremptory norm. The two scenarios were addressed in two separate

paragraphs. Paragraph 1 confirmed the general rule that a treaty was void in whole and no separation of the provisions of the treaty was permitted. The Special Rapporteur's formulation of that paragraph had been modified to track more closely the Vienna Convention and to make it consistent with draft conclusion 10 by replacing the term "invalid" with "void". The first part of the paragraph drew on article 53 of the Vienna Convention, which stated that "a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law". The second phrase followed the formulation in article 44 (5) of the Vienna Convention, which explicitly stated that in cases falling under article 53 of the Convention "no separation of the provisions of the treaty is permitted".

Paragraph 2 set forth the exception to the general rule stated in paragraph 1. The chapeau was based on the original proposal of the Special Rapporteur, except that the term "invalid" had been replaced with "void". Paragraph 2 provided that a treaty which became void because of the emergence of a new peremptory norm of general international law (*jus cogens*) terminated in whole, unless the cumulative conditions in subparagraphs (a) to (c) were met. The original wording proposed by the Special Rapporteur for subparagraphs (a) and (b) had been adjusted to echo that of article 44 (3) (a) and (b) of the Vienna Convention. The requirement in subparagraph (a) was that provisions in conflict with a peremptory norm of general international law (*jus cogens*) had to be separable from the remainder of the treaty "with regard" to their application. Subparagraph (b) had been revised and refined by adding the phrase "it appears from the treaty or is otherwise established that acceptance of the said provisions". The original reference to "do not constitute an essential basis" had been replaced with the words "was not an essential basis". The phrase "of any party to be bound by the treaty as a whole" had been inserted at the end.

A proposal had been made to replace the term "unjust" in subparagraph (c) with the phrase "harmful to the fundamental values of the international community" in order to distinguish a conflict with a peremptory norm of general international law (*jus cogens*) from other grounds of invalidity or termination of a treaty. However, the Drafting Committee had agreed that the term "unjust" did not relate to the underlying ground for invalidity but to the balance of rights and obligations created by the treaty, which should not be disturbed by separating only certain provisions from the treaty.

The title of draft conclusion 11 was "Separability of treaty provisions in conflict with a peremptory norm of general international law (*jus cogens*)". The Drafting Committee had decided to replace the term "severability", proposed by the Special Rapporteur, with "separability" for the sake of consistency with the terminology of the Vienna Convention.

Draft conclusion 12 concerned the consequences for the parties to a treaty of the invalidity and termination of that treaty if it conflicted with a peremptory norm of general international law (*jus cogens*). Paragraph 1 dealt with the scenario referred to in paragraph 1 of draft conclusion 10, namely where a treaty was void because it conflicted with a peremptory norm of general international law (*jus cogens*) when it was concluded. The parties to the treaty in question were under two legal obligations namely to: (a) eliminate as far as possible the consequences of any act performed in reliance on any conflicting provision of that treaty; and (b) to bring their mutual relations into conformity with the peremptory norm of general international law (*jus cogens*).

The wording of paragraph 1 was based on the proposal by the Special Rapporteur but it had been modified in order to bring it into line with article 71 (1) (a) and (b) of the Vienna Convention, as suggested during the plenary debate. The Drafting Committee had restructured the paragraph by replacing the term "invalid" with "void" in the chapeau, inserting the qualifying phrase "as far as possible", which was deemed to be a particularly important clarification, into subparagraph (a) and adding subparagraph (b). The Drafting Committee had also considered proposals for simplifying the formulation of the chapeau, but had settled for the current drafting.

Paragraph 2 dealt with the termination of an existing treaty on account of the emergence of a new peremptory norm of general international law (*jus cogens*). It followed the basic rule which was aimed at preserving rights, obligations or legal situations created

through the execution of the treaty prior to its termination, provided that those rights, obligations or situations might thereafter be maintained only to the extent that their maintenance was not in itself in conflict with the new peremptory norm of general international law (*jus cogens*). While the first part of the paragraph was based on the formulation proposed by the Special Rapporteur, the second part qualifying it tracked article 71 (2) (b) of the Vienna Convention.

The Drafting Committee had considered a number of proposals for the title of draft conclusion 12 and had settled on "Consequences of the invalidity and termination of a treaty which conflicts with a peremptory norm of general international law (*jus cogens*)". The draft conclusion contemplated in general terms the consequences of invalid and terminated treaties. The words "invalidity and termination" reflected the two scenarios envisaged therein. More specific drafting had been rejected in recognition of the fact that draft conclusion 12 did not address all the possible consequences, including, for example, those mentioned in draft conclusion 10, namely that the provisions of a void treaty had no legal force and the parties to a treaty that became void were released from any further obligation to perform the treaty. The Drafting Committee had again been faced with the conundrum of the interchangeable use of the words "void" and "invalidity". To avoid confusion, while the title referred to "invalidity", the text in paragraph 1 used "void".

Draft conclusion 13 concerned the effect of reservations to treaties on peremptory norms of general international law (*jus cogens*). In accordance with a suggestion made in the plenary debate, the Drafting Committee had aligned the text of the draft conclusion, as proposed by the Special Rapporteur, with that found in the Guide to Practice on Reservations to Treaties, adopted by the Commission in 2011.

Paragraph 1 confirmed that a reservation to a treaty provision which reflected a peremptory norm of general international law (*jus cogens*) did not affect the binding nature of that norm, which continued to apply as such. The Drafting Committee thought it useful to add the clarifying phrase "as such", found in guideline 4.4.2 of the Guide to Practice, in order to expressly confirm the continuing applicability of the peremptory norm in question outside the treaty context. The Drafting Committee had considered replacing the term "binding" with "peremptory" to emphasize the special nature of peremptory norms of general international norms (*jus cogens*), but it had ultimately decided that the phrase "as such" captured that special nature. However, the phrase "between the reserving State or organization and other States or international organizations", found in the aforementioned guideline had not been transposed to draft conclusion 13, since peremptory norms of general international law (*jus cogens*) were binding in the relations between all States (and international organizations).

Paragraph 2 confirmed that a reservation could not exclude or modify the legal effect of a treaty in a manner contrary to a peremptory norm of general international law (*jus cogens*). The Drafting Committee had decided to adopt the paragraph with the formulation proposed by the Special Rapporteur, which replicated virtually word for word paragraph 2 of guideline 4.4.3 of the Guide to Practice. The phrase "in a manner" was to be understood as referring to the legal effect of the treaty and not to exclusion or modification owing to conflict with a peremptory norm of general international law (*jus cogens*). Furthermore, the term "treaty" also encompassed the legal effect entailed by the phrase "certain provisions of the treaty", as explained in the commentary to guideline 4.4.3 of the Guide to Practice.

A proposal had been made to add a new paragraph 3 to draft conclusion 13, based on guideline 3.1.5.3 of the Guide to Practice, which would stipulate that the fact that a treaty provision reflected a peremptory norm of general international law (*jus cogens*) did not in itself constitute an obstacle to the formulation of a reservation to other provisions of that treaty. The Drafting Committee agreed that the issue was implicitly covered by paragraph 1 of draft conclusion 13 and would be best addressed in the commentary thereto.

The title of draft conclusion 13 was "Absence of effect of reservations to treaties on peremptory norms of general international law (*jus cogens*)". The version proposed by the Special Rapporteur had been modified to reflect the title of guideline 4.4.3 of the Guide to Practice with the addition of the phrase "of reservations to treaties", which had been

considered a useful specification since the scope of the draft conclusions was different to that of the Guide to Practice.

Draft conclusion 14 dealt with the procedural requirements applicable when a State invoked a conflict with a peremptory norm of general international law as grounds for the invalidation or termination of a rule of international law. During discussion in the Drafting Committee, it had been emphasized that the consequences of invoking a conflict with a peremptory norm of general international law were far-reaching and could not follow automatically from the claim that such a conflict existed. As the consequences of such a conflict could affect the stability of treaty relations, a unilateral determination of the existence of such a conflict by either the invoking or the objecting State must be avoided. A view had been expressed that it might be better not to include a draft conclusion on procedure at all, partly to avoid weakening the relevant procedures in the 1969 Vienna Convention.

Nonetheless, the prevailing view within the Drafting Committee had been that the question of the applicable procedure was key to the Commission's work on the topic. The relevant provisions of the 1969 Vienna Convention constituted a package: on the one hand, States could invoke a conflict with a peremptory norm of general international law (*jus cogens*) as grounds for a treaty to be invalidated or terminated; on the other, the Convention included procedural safeguards to preserve the integrity of the treaty. In the end, the Drafting Committee had decided to include a draft conclusion on the procedure for invocation and to solicit the comments of States on the appropriateness and content of the provision.

The Drafting Committee had adopted draft conclusion 14 on the basis of proposals inspired by the procedural requirements set out in articles 65 to 67 of the 1969 Vienna Convention. In its judgment in the case concerning the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, the International Court of Justice had noted that those articles reflected customary international law. Nonetheless, in the light of the non-binding nature of the draft conclusions, the Drafting Committee had replaced the compulsory formulation "shall", used in the Convention, with recommendatory wording such as "is to" or "are to", which was more in line with the purpose of the topic.

Paragraph 1 of draft conclusion 14 transposed the notification requirement found in article 65 (1) of the 1969 Vienna Convention to the claim of a possible conflict with a peremptory norm of general international law (*jus cogens*). The Drafting Committee had discussed limiting the paragraph to the termination and invalidity of treaties. Another possibility considered had been to refer to all rules of international law but to explicitly single out treaties, in recognition of the fact that the most likely invocation of invalidity or termination on account of a conflict with a peremptory norm of general international law might be in the context of treaty-based rules. The Drafting Committee had also considered making a specific reference to binding decisions of international organizations. It had settled on an even broader reference to "a rule of international law", without specifying the source of the rule, on the understanding that the commentary would clarify that such a reference covered treaties and other sources of international law, including unilateral acts and binding decisions of international organizations.

Having adopted a broader scope, the Drafting Committee had opted for the wording "States concerned", which was also used in subsequent paragraphs, instead of "States" or "parties", which were references typically more specific to treaties. Concerns had been expressed with regard to the practical implementation of such a broad approach. While the notification of other parties to a treaty could be effected through the depositary for the treaty in question, notification of the invalidity or termination of other rules of international law, potentially to the entire international community of States, posed practical difficulties, particularly for smaller States. To address such concerns, it had been suggested that such notification could be made through the Secretary-General of the United Nations.

The second sentence of draft conclusion 14 (1) combined the procedural requirements set out in the second sentence of article 65 (1) of the 1969 Vienna Convention with that in article 67 (1) thereof. The Drafting Committee had taken the view that, while

of international law and a peremptory norm was claimed, written notification would provide greater legal certainty.

Paragraph 2 of draft conclusion 14 was based on article 65 (2) of the 1969 Vienna Convention. Following notification by a State claiming the invalidity or termination of a rule of international law as a result of a conflict with a peremptory norm of general international law, other States were to be given a reasonable period within which to reply. In line with that article, the Drafting Committee had considered three months to constitute a reasonable minimum period.

Paragraph 3 of draft conclusion 14 set out the next step in the envisaged procedure, by which, if an objection were lodged under paragraph 2, then the States concerned should seek to resolve the dispute by any of the means indicated in Article 33 of the Charter of the United Nations, which included the possibility of submitting the dispute to arbitration, as in the Special Rapporteur's original proposed draft conclusion and in article 66 (a) of the 1969 Vienna Convention. However, a view had also been expressed that the *ad hoc* nature of arbitration might make it an unsuitable forum for resolving disputes involving peremptory norms of general international law. Furthermore, the possibility of submitting disputes to arbitration under article 66 (a) of the 1969 Vienna Convention was subject to a 12-month time limit, which could result in different limitations being applicable to parties and non-parties to the Convention.

Paragraph 4 of draft conclusion 14, which was inspired by article 66 (a) of the 1969 Vienna Convention, laid down the next step of the suggested procedure. It would be triggered when resort to means of settlement under paragraph 3 did not result in a solution within a period of 12 months. In such circumstances, the objecting State or States could offer to submit the matter to the International Court of Justice, and the invoking State would not be able to carry out the measure it had proposed until the dispute was resolved. The Drafting Committee had taken the view that linking the resolution of disputes to the offer of judicial settlement and acceptance of the jurisdiction of the Court would demonstrate the good-faith basis of the claim and corresponding objection. The formulation of the paragraph was intended to resolve the problem that not all States were subject to the compulsory jurisdiction of the Court. Nonetheless, the Drafting Committee acknowledged that a claim of invalidity or termination because of a conflict with a peremptory norm of general international law did not *per se* establish the jurisdiction of the Court or of any other international court or dispute settlement procedure.

The Drafting Committee had also been confronted with the problem of potential conflicts with procedures already established in the 1969 Vienna Convention. To address such concerns, a "without prejudice" clause had been inserted as paragraph 5 of draft conclusion 14 in order to preserve the procedural requirements set forth in the Vienna Convention, the relevant rules concerning the jurisdiction of the Court, and other applicable dispute settlement provisions agreed by the States concerned. The third element was intended to cover other dispute settlement agreements applicable between the States concerned, such as optional clauses or multilateral treaties establishing relevant procedures.

The Drafting Committee had agreed that the placement of draft conclusion 14 within the set of draft conclusions would need to be finalized at a later stage, partly because its scope was no longer limited to treaty rules.

Mr. Nolte, referring to draft conclusion 14, said that he wished to place on record that it was his understanding that the wording "is to" and "are to" had been chosen by the Drafting Committee in preference to "shall" precisely because those terms were ambiguous, leaving some latitude for them to be interpreted as more than simply recommendatory, particularly if the draft conclusion was intended to reflect the view of the International Court of Justice on the customary nature of articles 65 to 67 of the 1969 Vienna Convention.

Protection of the environment in relation to armed conflicts (agenda item 8) (*continued*) (A/CN.4/720)

Report of the Drafting Committee (A/CN.4/L.911)

Mr. Jalloh (Chair of the Drafting Committee), introducing the report of the Drafting

that the Drafting Committee had devoted three meetings to its consideration of the topic, from 17 to 19 July. It had examined the three draft principles initially proposed by the Special Rapporteur in her first report (A/CN.4/720), together with a number of reformulations she had proposed to the Drafting Committee in response to suggestions made and concerns raised during the Commission's debate. The Drafting Committee had provisionally adopted three draft principles during the present session, the titles and texts of which were contained in document A/CN.4/L.911.

A number of suggestions for additional draft principles made during the Commission's debate had also been considered. The Drafting Committee had first discussed whether it would be appropriate to adopt a separate draft principle on the applicability of the law of occupation to international organizations. After a thorough debate, it had been decided that the issue would be best addressed in the commentary, given that, although international organizations might exercise functions similar to occupying States in certain circumstances, the international administration of a territory could not easily be equated to military occupation and there was little practice on which to build. The Drafting Committee had agreed with the Special Rapporteur's proposal to use the term "Occupying Power" in the draft principles, thereby leaving the door open to possible future developments.

In the light of a proposal that had been made during the Commission's discussion, obtaining much support, the Drafting Committee had also debated the question of whether to include a provision indicating that the draft principles already adopted applied *mutatis mutandis* to situations of occupation. The Drafting Committee had ultimately considered that the relationship with other draft principles should be explained in a general commentary to Part Four of the set as a whole.

Draft principle 19 focused on the general obligations of an Occupying Power. As the Special Rapporteur had indicated in her first report, the law of occupation was based primarily on the Regulations respecting the Laws and Customs of War on Land (the Hague Regulations) of 1907 and complemented by the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), which referred only indirectly to the protection of the environment, along with certain provisions of the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Additional Protocol I) and customary international humanitarian law. The obligations of an Occupying Power must nevertheless be interpreted within the contemporary legal context, which included rules pertaining to environmental concerns as an essential interest of all States. The purpose of paragraph 1 of draft article 19 was to set forth the general obligation of an Occupying Power. The draft principle derived also from the general thrust of article 43 of the Hague Regulations, which imposed upon the Occupying Power the obligation to take care of the welfare of the population of an occupied territory. The Drafting Committee had proceeded on the basis of the revised version of draft principle 19 (1) that the Special Rapporteur had presented in the statement introducing her first report. The Drafting Committee had considered it appropriate to use the term "Occupying Power", rather than "occupying State", as it was a term of art used in the Fourth Geneva Convention and Additional Protocol I, in addition to allowing flexibility with regard to the role of international organizations.

As the law of occupation was a subset of the law of armed conflict, draft principle 19 should be read in the context of draft principle 9. Both draft principles referred to the obligation to protect and respect the environment in accordance with applicable international law, although draft principle 19 did so in the more specific context of occupation. The term "applicable international law" referred in particular to the law of armed conflict, but also to international environmental law and international human rights law.

The Drafting Committee had discussed the meaning of the term "environmental considerations" in draft principle 19 (1). General agreement had been expressed with the Special Rapporteur's view that the expression was context-dependent and evolving and would need further clarification in the commentary. Further to the concerns expressed by

territorial State was entitled to exercise sovereign rights, which was unnecessary in the text of the draft principle and could be explained in the commentary.

During the Commission's debate on draft principle 19, a number of members had suggested the adoption of an additional provision to address human rights relevant to environmental protection, and specific proposals had been made in that regard. Paragraph 2 of draft principle 19, as contained in document A/CN.4/L.911, was a new paragraph that had been introduced in response to those comments. Its purpose was to indicate that significant harm to the environment of an occupied territory could have adverse consequences on the population of the territory in question, particularly with respect to the enjoyment of certain human rights. The Drafting Committee had debated the necessity of adopting a paragraph on that specific issue, given that paragraph 1 of draft principle 19 already required the Occupying Power to respect and protect the environment of the occupied territory in accordance with applicable international law, which included international human rights law. After an extensive debate, it had been decided that an additional paragraph was appropriate in view of the importance of the matter. The Drafting Committee had agreed that the commentary would clarify the need to read paragraph 2 in the context of paragraph 1 and would explain that, while paragraph 1 covered the obligation of the Occupying Power in general terms, paragraph 2 referred to a specific element of that obligation.

The Drafting Committee had also discussed whether to refer to international human rights in general or to highlight specific rights, such as the right to health. Given the general reference in paragraph 1 of draft article 19, it had been decided to refer specifically to the health and well-being of the population of the occupied territory in paragraph 2. The commentary could explain that the provision also covered a number of other human rights, such as the right to life or the right to food. The words "that is likely to prejudice" were intended to provide a basic link; the concept of "the health and well-being of the population" would also be clarified in the commentary. The phrase "shall take appropriate measures to prevent significant harm" reflected wording used in the Commission's previous work, particularly the articles on prevention of transboundary harm from hazardous activities, but it was understood that the word "significant" did not represent an additional threshold, as the harm in question was already qualified by the last part of the sentence.

Paragraph 3 of draft principle 19 was intended to limit the extent to which the Occupying Power could modify the law and institutions of the occupied territory concerning the protection of the environment; it corresponded to draft principle 19 (2) in the Special Rapporteur's first report. During the Commission's debate, some members had suggested that the obligation of an Occupying Power to respect the national laws of the occupied territory "unless absolutely prevented", despite being based on article 43 of the Hague Regulations, did not reflect the latitude afforded by the law of armed conflict for Occupying Powers to legislate when necessary for the maintenance of public order and civil life and for the benefit of the local population. The Special Rapporteur had accordingly made a new proposal within the Drafting Committee, omitting reference to that stringent exception. A number of members of the Drafting Committee had pointed out that the term "legislation", used in the original proposal, could have different meanings in different legal systems and might be understood in a restrictive way. The Drafting Committee had therefore decided to use the more generic word "law" to indicate clearly that the obligation was not limited to certain categories of domestic legislation. The need to refer specifically to institutions, which could be covered by the term "law", had also been discussed. Further to the explanations provided by the Special Rapporteur, the Drafting Committee had considered it appropriate to retain an explicit reference to institutions, as the Geneva Conventions of 1949 contained provisions specifically addressing the maintenance of the institutions of the occupied territory, and institutional collapse was a common feature of conflict situations.

The Drafting Committee had agreed with the Special Rapporteur that mention should also be made of the limitations imposed by international law on the ability of an Occupying Power to modify laws and institutions of the occupied territory concerning protection of the environment, as indicated by the phrase "within the limits provided by the

The purpose of draft principle 20 was to set forth the obligations of an Occupying Power as administrator and usufructuary with respect to the sustainable use of natural resources. It applied "[t]o the extent that the Occupying Power [was] permitted to administer and use the natural resources in an occupied territory". Members of the Drafting Committee had suggested that such wording would allow for an explanation in the commentary of the various types of limits on the Occupying Power and the law from which they derived. It was also reflected by the use of the verb "permitted". The Drafting Committee had decided to use the phrase "administer and use" in light of the terminology used in article 55 of the Hague Regulations.

The Drafting Committee had debated including a provision that such administration and use must be for the benefit of the population of the occupied territory. While a number of members of the Committee had considered such a mention necessary, others had pointed out that the law of armed conflict allowed for other possibilities, in particular the use of natural resources for occupation forces and administration personnel. It had therefore been decided to cover all possible situations by indicating that such administration and use of natural resources in the occupied territory could be "for the benefit of the population of the occupied territory and for other lawful purposes under the law of armed conflict".

As the Special Rapporteur had indicated, the right of usufruct from which the provision derived must be interpreted with due consideration for the well-established concept of sustainability and in the context of the sustainable use of natural resources. It was the Drafting Committee's understanding that the term "sustainable use" did not preclude the use of non-renewable natural resources and that a clarification to that effect would be included in the commentary. In addition, the notion of minimizing environmental harm directly reflected draft principle 2. The Drafting Committee had therefore not considered it appropriate to alter the word "minimize" to "prevent".

Draft principle 21, which had enjoyed general support during the Commission's debate, was based on the judgment of the International Court of Justice in the case concerning *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*. The Drafting Committee had decided to refine it and to indicate more firmly that an Occupying Power was required to exercise due diligence. It had also changed the words "significant damage" to "significant harm", to ensure consistency with other draft principles and with the Commission's previous work on other topics. As the territory occupied might in some cases extend to only part of the territory of a State, several members of the Committee had considered that the phrase "to the environment of another State or to areas beyond national jurisdiction" could be interpreted as excluding the territory of other parts of the same State. It had therefore been decided to indicate that the territorial scope of the provision should cover "areas beyond the occupied territory". The view had been expressed, however, that the expression "areas beyond national jurisdiction" should have been retained, as it was commonly used in international instruments.

The draft principles were presented for information only; they would be submitted for provisional adoption by the Commission at a later stage, once the commentaries had been prepared.

The Chair said that it was his understanding that the Special Rapporteur would prepare commentaries to draft principles 19, 20 and 21 for the following session of the Commission.

He took it that the Commission wished to take note of the report of the Drafting Committee on protection of the environment in relation to armed conflicts contained in document A/CN.4/L.911.

It was so decided.

The meeting rose at 11.30 a.m. to enable the enlarged Bureau to meet.